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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of 2000, 2001, 2002	)	Docket No. 2008-2 CRB CD
And 2003 Cable Royalty Funds	)	2000-2003 (Phase II) (Second
	)	Remand)
	)	

INDEPENDENT PRODUCERS GROUP'S OPPOSITION TO SETTLING DEVOTIONAL CLAIMANTS' MOTION FOR FINAL DISTRIBUTION UNDER 17 U.S.C. § 801(b)(3)(A); IPG MOTION FOR SANCTIONS

Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG") hereby submits its *Opposition to Settling Devotional Claimants' Motion for Final Distribution under 17 U.S.C. § 801(b)(3)(A)* and *Motion for Sanctions*

INTRODUCTION

The unfortunate circumstance presented by the Settling Devotional Claimants ("SDC") is one of misrepresentation to the Judges, and purposeful sabotage of these proceedings. Despite the SDC affirmatively representing to IPG that all settlement discussions were confidential, and despite IPG

expressly informing the SDC that it considered the product of those discussions to be confidential, the SDC has included as exhibits to its motion all of the confidential settlement correspondence amongst the parties. Review of those emails, and the settlement offers contained therein, conspicuously reflect the phrase "CONFIDENTIAL SETTLEMENT COMMUNICATION", drafted by counsel for the SDC's own hand. See SDC Exhs. 1, 2, 3 (July 11 and July 12 correspondence). The SDC's inclusion of that correspondence, after affirmatively representing that it would be kept "confidential", is nothing less than contemptuous of the notion of confidentiality. To the extent that the Judges desire to "maintain the integrity of these proceedings", here is the opportunity.

Notably, while the SDC asserts that the entirety of the "agreement" between IPG and the SDC is contained in only portions of two emails (SDC motion at 1-2), the SDC nevertheless includes the *entirety* of those emails and scores of other emails between the parties in its exhibits, i.e., the entire chain of email correspondence. Nonetheless, where convenient, the SDC had no hesitation to excise information it did not desire to be made public, as reflected in the redactions appearing in all three of the SDC's exhibits.

Clearly, the SDC's ulterior motive was to reveal all of the information that IPG was assured would not be revealed (even if irrelevant to the issue of whether a settlement agreement had been reached), while holding confidential all of the information that the SDC did not want revealed.

Notably as well, while obvious issues of confidentiality were articulated by IPG ***prior*** to any contact with the Judges informing them that a settlement had been reached, the SDC made no attempt to file any portion of the communications under seal, as is commonplace, but instead presented them for the world to see.

Furthermore, while the primary purpose of agreement-confidentiality is to shield the settlement details from the Judges in order to avoid such settlements from influencing future determinations, the SDC present the agreed-upon settlement percentages and related communications directly to the standing Judges, making it impossible to "un-ring" the bell that has been struck.

Moreover, while the text of the SDC motion recites the only two excerpts that it asserts define the entire scope of the settlement agreement, it (i) *omits* the caveat that was contained in IPG's acceptance of distribution

percentages as though it did not exist,[1] and (ii) in the SDC's proposed order nevertheless includes a provision *found nowhere* within the purportedly defining excerpts.[2]

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[1] The full text of IPG's July 16, 2019 email, wherein IPG accepted the distribution percentages being offered by the SDC, contains a caveat that requires certain information to be confirmed by the Licensing Division:

> "Arnie, IPG accepts the SDC's offer of 31.25% of the 2000-2003 cable royalty pool attributable to the devotional programming category in order to settle the 2000-2003 cable proceeding. We have reached out to the Licensing Division of the Copyright Office in order to determine the exact value of such pool, but suffice it to say that as long as the figures provided to IPG by the SDC previously were accurate when made (figures IPG has been relying on for several years), there will be no issue."

SDC Exh. 1 (July 16 email from Boydston to Lutzker).

[2] Specifically, the SDC's proposed order includes the following text:

> "This agreed distribution for cable royalty years 2000 through 2003 in the Devotional category shall have no effect on any other categories, funds, or years."

Although IPG would have been receptive to a provision in a "confidential" settlement agreement, whereby the Judges could not be influenced by the agreed-upon percentages, if such percentages were to be made available to the Judges, IPG would *not* have agreed to such provision.

Finally, although the SDC allege that IPG consented to the parties informing the Judges of a settlement ***after*** the SDC had raised an issue with IPG regarding confidentiality, the communications between the parties reflect a very different situation. The SDC's own communication makes clear that the SDC's concern with confidentiality was premised on:

> "[T]he practical obstacles [of designating a common agent and with calculating interest from figures only the Licensing Division retains that] will be difficult or impossible to overcome".

SDC Exh. 1 (July 16 and 17 emails from SDC to IPG). To this statement, IPG *immediately* informed the SDC that IPG:

> "was waiting to hear back from the Licensing Division regarding information that should allow us to move forward *confidentially*."

SDC Exh. 1 (July 17 email from IPG to SDC)(emphasis added). Such was the last communication from IPG before the SDC proposed notifying the Judges that a settlement had been entered into – leaving IPG with the distinct understanding that IPG's suggestions to address any SDC concerns were sufficient. While the SDC suggest that IPG waived any concern for confidentiality, the contrary is true – IPG articulated the means to address

the SDC's "practical obstacles", and reiterated its expectation that the agreement would be confidential. The SDC made no objection thereto, and understood this fact when it prepared and submitted to the Judges the *Joint Notice of Settlement and Motion for Stay*.

IPG further addressed the SDC's "practical obstacle" of designating a common agent – as has existed with *each and every* settlement between IPG and the SDC for the last two decades, and as between *all other parties entering into settlement agreements in these proceedings* – by proposing that the SDC act as the common agent by receiving the balance of devotional programming funds, then distributing IPG's share to IPG. See SDC Exh. 2 (July 18 email from IPG to SDC, and attached draft of proposed settlement agreement, at para. 2.3). To IPG's proposal, the SDC indicated without explanation that it was rejecting such provision. SDC Exh. 3 (July 18 email from SDC to IPG). In response, IPG agreed to accept the responsibility as common agent, and incorporated such change into a new draft. SDC Exh. 3 (July 18 email from IPG to SDC). Notwithstanding, the SDC then rejected having IPG as the "common agent", or *any* common agent [SDC Exh. 3 (July 19 email from SDC to IPG)], despite previously opining to IPG that a

common agent would be necessary to maintain confidentiality. SDC Exh. 3 (July 18 email from SDC to IPG).

In sum, in order to avoid keeping the settlement agreement confidential, the SDC simply refused to agree to a structure that (it acknowledged) must exist in order to keep the settlement agreement confidential – the appointment of any common agent.

ARGUMENT

A. IF THE JUDGES DEEM THERE TO BE AN EFFECTIVE "SETTLEMENT AGREEMENT", IT MUST ADDITIONALLY ASSESS AN APPROPRIATE SANCTION AGAINST THE SDC AND ITS LEGAL COUNSEL.

In the event that the Judges deem there to be an effective settlement agreement, there can be no alternative other than to strictly impose the terms that were agreed upon. That is, the Judges must require the Licensing Division to engage in an analysis to determine the amount allocable to the devotional programming category, taking into consideration the amounts previously advanced to the SDC and the growth of the remaining capital, all before imposing the percentage splits agreed upon between IPG and the

SDC. Further, and as was an *explicit* caveat of IPG's acceptance, if the monetary figures previously reported by the SDC to IPG as allocable to the devotional programming category was inaccurate (see fn. 1, supra), IPG's share of the devotional programming category monies must be adjusted upward to account for such discrepancy. Further, the Judges must disregard provisions such as those submitted by the SDC as part of its "proposed order" that find no basis in the narrow agreement that the SDC asserts was entered into. See fn. 2, supra.

Notwithstanding, in prior circumstances, parties have sought to have IPG sanctioned for *inadvertently* disclosing information subject to a protective order. In the instant circumstance, the SDC should be sanctioned for the *knowing* refusal to keep its settlement communications with IPG confidential after representing that such communications would be deemed confidential.

Obviously, allowing a party to breach its express representations of confidentiality without consequence will stifle any possibilities of settlement. IPG, predictably, will head into no negotiations with the SDC from this point forward without both a requirement of confidentiality and a

defined “liquidated damages” provision – all before ever negotiating with the SDC. This unfortunate development is the direct result of the improper actions taken by the SDC and its legal counsel, all of which should never have occurred.

In fact, simply imposing the distribution percentages negotiated between IPG and the SDC will not now make IPG whole. IPG has been damaged in an overt, obvious way, for which both IPG should be recompensed and the SDC should be sanctioned in a manner that will provide a sufficient deterrent for engaging in such breaches in the future. IPG has a variety of suggestions, one or more of which should be imposed on the SDC:

1) Impose a monetary sanction against the SDC in an amount equal to the last offer made by IPG prior to agreeing to the percentages later agreed upon. That offer was set forth in the correspondence attached as exhibits to the SDC motion, and states that IPG “would be willing to take [“what the CRB ordered the first time around”],

less $100,000".[3] See SDC Exh. 1 (July 12 email from IPG to SDC);

2) Impose a monetary sanction against the SDC in an amount equal to the costs of the 2000-2003 cable distribution proceedings;

Regardless, and in addition to the foregoing, admonishment should specifically issue against the author of the SDC motion, Matthew MacLean and the law firm of Pillsbury, Winthrop, et al.[4]

Regardless, and in addition to the foregoing, the SDC motion and its accompanying exhibits, should immediately be stricken from the record, and removed from the eCRB system that allows online access thereto, as with

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[3] Such percentages are set forth in the *Final Distribution Order*, at 78 Fed. Reg. 64984 (Oct. 30, 2013).

[4] As a basis of comparison, the Judges formally admonished IPG and its counsel when a motion was served on opposing counsel electronically, but was not thereafter followed by the mailing of a hard copy. See Docket no. 2012-6 CRB CD 2004-2009 (Phase II), *Order Admonishing IPG* (Jan. 3, 2017). An issue arose because the SDC and MPAA counsel all claimed to have never received the email, and even though IPG's counsel forwarded a copy of the confirmation to those counsel within minutes of being informed by them that they were unaware of the motion, and offered those parties the opportunity to submit opposition briefs if they desired, the failure to follow up with a hard copy was deemed worthy of admonishment. Id.

each passing day they continue to make publicly available communications that were expressly subject to a representation of confidentiality.

B. IF THE JUDGES DEEM THERE TO BE NO EFFECTIVE "SETTLEMENT AGREEMENT", IT MUST REINSTITUTE THE PROCEEDINGS WITH A NEW PANEL OF JUDGES.

Most disturbing is that by breaching its agreement of confidentiality with IPG – set forth in its own emails -- the SDC has necessarily limited any constructive means to remedy its indiscretion, or at least any remedy that can be easily effectuated. While IPG previously had the option of simply informing the SDC that the parties were at an impasse on the term of confidentiality, and that no settlement agreement had therefore been reached, the SDC has taken it upon itself to "poison the well" by conveying the specifics of the parties' settlement negotiations to the Judges and the world. Now that such option has been removed, IPG can only ensure that it will not be prejudiced by the SDC's imprudent revelation by demanding that an entirely different panel of Judges be enlisted in order to review this administrative matter – Judges that have not seen the SDC motion or its exhibits.

Consequently, and to assure that IPG is not prejudiced by the SDC's acts in direct contravention of the representations of confidentiality that the SDC made, if the Judges opine that a "settlement agreement" was not reached, the Judges should recuse themselves from this proceeding. In turn, the Librarian should be notified of the situation, and a different group of Judges empaneled in order to complete the proceedings.

CONCLUSION

It is difficult to conceive of a party engaging in the type of behavior demonstrated by the SDC, and the undersigned has never witnessed it during his career. Unlike any prior sanctionable acts presented to the Judges, all of which involved inadvertent revelations of information, or actions for which only technical non-compliance with a regulation could be asserted, the SDC submitted its motion *knowing* that it was revealing confidential communications that it had agreed to keep confidential, and *knowing* that IPG objected to revelation of their confidential communications. Moreover, such information included a wide swath of information unnecessary to establish the SDC's argument that a settlement agreement had been entered into, demonstrating an ulterior motive for the SDC's impermissible breach.

IPG contends that a settlement agreement had been reached with the SDC, and it was subject to the same terms of confidentiality as to which the settlement negotiations were expressly subject. If the SDC disagreed, it was within its discretion to assert that no agreement had been entered into, and could have done so before informing the Judges that a settlement agreement had been concluded. It was not within the SDC's discretion to demand the existence of an agreement, and then reveal communications clearly subject to an agreement of confidentiality. Having engaged in its chosen course of action, the SDC has now denied IPG any opportunity to proceed before the current panel of Judges in the absence of their knowledge of those confidential communications.

Significant sanctions are warranted.

Respectfully submitted,

Dated: August 5, 2019

_____/s/_____
Brian D. Boydston, Esq.
California State Bar No.155614

PICK & BOYDSTON, LLP
2288 Westwood Blvd., Ste. 212
Los Angeles, California 90064
Telephone: (424)293-0111
Email: brianb@ix.netcom.com

Attorneys for Independent
Producers Group

CERTIFICATE OF SERVICE

I hereby certify that on this August 5, 2019, a copy of the foregoing was electronically filed and served on the following parties via the eCRB system.

_____/s/_____
Brian D. Boydston

DEVOTIONAL CLAIMANTS:

Matthew MacLean
Michael Warley
Jessica Nyman
Pillsbury, Winthrop, et al.
1200 17th Street, NW
Washington, D.C. 20036

Proof of Delivery

I hereby certify that on Monday, August 05, 2019, I provided a true and correct copy of the INDEPENDENT PRODUCERS GROUP'S OPPOSITION TO SETTLING DEVOTIONAL CLAIMANTS' MOTION FOR FINAL DISTRIBUTION UNDER 17 U.S.C. § 801(b)(3)(A); IPG MOTION FOR SANCTIONS to the following:

Settling Devotional Claimants (SDC), represented by Michael A Warley, served via Electronic Service at michael.warley@pillsburylaw.com

Signed: /s/ Brian D Boydston